

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 10.10.2006

CORAM:

THE HON'BLE MR. JUSTICE K.MOHAN RAM

Second Appeal No.1021 of 2006
and C.M.P.No.9762 of 2006

1. K.Perumal
2. K.Shanmugam
3. K.Jayakumar
4. K.Unnamalai

.. Appellants/Defendants

-Vs-

M.Murugesan

.. Respondent/Plaintiff

APPEAL against the judgment and decree dated 15.10.2001 in A.S.No.182 of 1999 on the file of the III-Additional District Judge, Salem confirming the judgment and decree dated 21.09.1999 in O.S.No.697 of 1994 on the file of the II-Additional District Munsif, Salem.

For Appellants : Mr. D.Shivakumaran
For Respondent : Mr. S.P.Subramanian

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J U D G M E N T

The unsuccessful defendants in O.S.No.697 of 1994 on the file of the Second Additional District Munsif Court, Salem are the appellants in the above second appeal.

2. For the sake of convenience the parties are referred to as per their ranking in the suit.

3. The brief facts of the case are as follows:-

'The plaintiff filed O.S.No.697 of 1994 seeking a decree for declaration that he and his family members are entitled to have access to the Kamarajar Street from all points on the boundary of their house and for permanent injunction restraining the defendants from in any way interfering with the peaceful enjoyment and use of the Kamarajar Street by the plaintiff and his family members in the following circumstances':

The plaintiff became owner of the house bearing Door No.54 Kamarajar Street, Old Sooramangalam, by virtue of the settlement deed executed by his mother-Nallakkal on 21.08.1978. The old door number of the house is 65. According to the plaintiff, he and his family members are residing in the house for more than 40 years and using the street for their access to go in and out of their house; the property of defendants 1 and 4 are situated just opposite to the plaintiff's house and the houses of defendants 2 and 3 are situated in the east of the plaintiff's house and the defendants are entitled to use the street in the same manner as the plaintiff uses it; the plaintiff's house is facing north and Kamarajar Street is running east-west and the width of the street is 12 feet in front of the plaintiff's house and it is a public street; since defendants 1 and 4 attempted to encroach into the street with the help of defendants 2 and 3, a police complaint was preferred by the plaintiff on 24.07.1994 and 17.06.1995 and since it did not yield any result, the above suit has been filed.

4. The first defendant filed a detailed written statement which has been adopted by defendants 2 to 4. In the written statement it has been inter alia contended that all the averments contained in the plaint are false; there is no Kamarajar street running east-west as alleged by the plaintiff; on the north of the plaintiff's house, a patta land alone is there and only on the western side to certain extent a street called Kamarajar Street is there; the defendants are not at all obstructing the plaintiff with his enjoyment of the property covered under the sale deed; but the plaintiff is trying to encroach the property of the defendants on the north; the vacant space in between the house of the plaintiff and the defendants absolutely belongs to the defendants and it is not a pathway as alleged. It is further contended that for the convenience of the defendants the first defendant had left a space in which nobody has got any right; Kamarajar street is 12 feet width in front of the plaintiff's house and is not a public street and on the north of the plaintiff's house there is a space of 1 1/2 feet and the plaintiff is using the same; the plaintiff gave a false complaint to the police and hence the police did not take any action; since the plaintiff has no right over the property belonging to the defendants, the suit is liable to be dismissed.

5. The trial court framed appropriate issues and during trial, on the side of the plaintiff he got himself examined as P.W.1 and examined P.W.2 and P.W.3 and Exs.A-1 to A-22 were marked. On the side of the defendants, the first defendant was examined as D.W.1 and two other witnesses were examined and Exs.B-1 to B-6 were marked and Exs.C-1 and C-2-the Commissioner's report and plan were marked.

6. On a consideration of the oral and documentary evidence adduced in the case the trial court decreed the suit as prayed for. Being aggrieved by that the defendants preferred an appeal in A.S.No.182 of 1999 before the Principal District Court, Salem but the same was dismissed and hence the defendants have filed the above second appeal.

7. The learned counsel for the appellants submitted that the Courts below have not properly considered the first defendant's title deed-Ex.B-1 wherein it is clearly stated that the property on the northern side of the property of the plaintiff is patta land belonging to the first defendant. The learned counsel further submitted that the evidence of D.W.2-the Assistant Engineer from Salem Corporation clearly establishes that the suit property lying on the northern side of the plaintiff's house was never dedicated or made over to the Municipal Corporation as a road. The learned counsel further submitted that the Commissioner's report and plan has been misconstrued by the Courts below. The learned counsel further submitted that the Courts below have misread the evidence of D.W.1 and have observed as if the first defendant had admitted that the suit property has been used as the public pathway for more than 50 years.

8. A perusal of the pleadings shows that the portion lying on the north of the plaintiff's house and south of the first defendant's house is the disputed portion. A perusal of Exs.C-1 and C-2 shows that Kamarajar Street branches off from Tharamangalam main road which runs east-west. The said street which runs up to the defendant's house takes a turn towards east near the defendant's house and on either side of the east-west street houses are located. An electric post also has been noted by the Commissioner and near the electric post the width of the pathway is 5 feet and near another electric post the width of the street is shown as 7 feet. The Courts below in the light of Exs.C-1 and C-2 and the recitals in Ex.A-1 have come to the conclusion that the pathway exists on the north of the plaintiff's house. The Courts below have also pointed out that the witnesses have also admitted the existence of the pathway for a long time. The lower appellate court has also pointed out that originally the door way of the plaintiff's house was facing east and thereafter he has located the door way on the north and the same has been admitted by the defendants and it is also pointed out that when the plaintiff located the door way the defendants have not objected the same. The trial court has also pointed out that D.W.1 in his evidence admitted the usage of the pathway by the plaintiff and others residing on the east for more than 50 years. From the above said admission of D.W.1 and the recitals in Ex.A-1 and the admission of D.W.2 that Kamarajar Street is also called as Sanar/Nadar street, the trial court has come to the conclusion that

the space in between the houses of the plaintiff and the first defendant is a street. The trial court on an analysis of the evidence of P.W.2 and P.W.3 has come to the conclusion that the suit property is being used as a street for long. The trial court has also pointed out that the witnesses examined by the defendants have admitted about the maintenance of the street by the municipality. On a consideration of Exs.A-9 to A-16 and Ex.B-5 the trial court has come to the conclusion that Kamarajar Street mentioned therein is the suit property. The lower appellate court apart from considering the reasonings of the trial court has independently analysed the evidence on record and has concurred with the findings of the trial court.

9. The Apex Court in the decision rendered in the case of Thimmaiah and Others Vs. Ningamma and another reported in 2000 (7) S.C.C. 409 in paragraph 13 has observed as follows:-

"13. But at the same time, this Court has noted that the High Court has no jurisdiction to entertain a second appeal "on the ground of an erroneous finding of fact however gross or inexcusable the error may seem to be". In other words, if there is some evidence and the appreciation of the evidence is erroneous, a second appeal will not lie".

and in the same decision it has been further observed that the High Court is not entitled to reassess the evidence and arrive at a different conclusion.

10. In the decision reported in 2000 (10) S.C.C. 244 (M.Nadar Kesavan Nadar Vs. Narayanan Nadar Kunjan Nadar) the Apex Court has laid down as follows:-

"Even if the finding of fact was wrong, in our opinion this finding of fact could not be disturbed specially when the High Court has not come to the conclusion that the same was not perverse nor was based on no evidence".

11. The learned counsel for the appellants is unable to point out any infirmity in the reasonings of the Courts below. In view of the above said findings recorded by the Courts below on an analysis of the legal evidence available on record the submission of the learned counsel for the appellants are liable to be rejected. It is not the case of the appellants that the findings of the Courts below are not based on evidence but the contention is that since the east-west street is not shown as a public street in the municipal records, the plaintiff/respondent is not entitled to have a right of access to the same. This contention of the appellants is liable to

be rejected in view of the clear admission of D.W.1. It has to be pointed out at this juncture that D.W.1 has admitted that the suit property is used as pathway by several persons for long number of years and that being so there is absolutely no justification on the part of the first defendant to object the use of the suit property as a pathway by the plaintiff alone. In equity also, the defendants have no case. Simply because the suit property has not been shown as a public street it will not takeaway the right of the plaintiff to use the same as a pathway. As pointed out above the Apex Court has repeatedly pointed out that the High Courts while exercising jurisdiction under Section 100 Code of Civil Procedure cannot re-appreciate the evidence and set-aside the findings simply on the ground that another view is possible.

12. For the above said reasons the second appeal fails and the same is dismissed. However, there will be no order as to costs. Consequently, the connected CMP is closed.

srk

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. The III Additional District Judge, Salem.
2. The II Additional District Munsif, Salem.

AKM (CO)

dv/15.11.06

S.A. No.1021 of 2006 and
C.M.P.No.9762 of 2006

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